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No. 88-1366

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

Wayne A. Simmons, James Nalls, Thomas Miller, Mark Meske and The City of Santa Barbara,

Petitioners,

vs.

Irma Jean Perez,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a municipality trains its police officers to make forcible searches of third-party homes, without search warrants, to find fugitives for whom they have only arrest warrants, based solely on the officer's hunch that the fugitive can be found within, can the municipality be liable under 42 U.S.C. § 1983 for an illegal search caused by such erroneous training?

2. Should *Steagald v. United States*, 451 U.S. 204 (1981), be overruled?

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

CONCISE STATEMENT OF THE CASE 1

1. A Note on the Pleadings 1

2. Irma Perez' Residence and Family (Plaintiff's Evidence) 1

3. The Narcotics Section is Reminded of Albert Perez (Defendants' Testimony) 2

4. Albert Sighted and Lost; An Inquiry Regarding His Sister's Address (Defendants' Testimony) 2

5. A Different Recollection 3

6. Arrangements for a Spontaneous Search 4

7. The Fact Situation Immediately Prior to Entry 4

8. Santa Barbara Training Policies and Customs: the State of Training of the Defendant Officers at the Time of Entry 4

9. A Forcible Entry Without a Search Warrant 7

10. A Call for Police Assistance Interrupted by an Immediate Arrest 8

11. The Long Way to Jail 9

ARGUMENT

1. CERTIORARI SHOULD NOT BE GRANTED ON THE FOURTH AMENDMENT ISSUE BECAUSE: (1) THE APPLICABLE LAW WAS SETTLED BY STEAGALD; (2) THE NINTH CIRCUIT DECIDED THIS CASE CORRECTLY; AND (3) THE ELEVENTH CIRCUIT CASE IS SUFFICIENTLY AMBIGUOUS THAT UNSUPPORTABLE ASSUMPTIONS ARE NECESSARY IN ORDER TO READ IT AS CONFLICTING WITH *STEAGALD* 10

Table of Contents - Continued

A. The Need to Ask the Question Right 10

B. A Matter of Perspective 10

C. The Court Below Decided This Case Correctly 13

D. The *De Parias* Opinion is Not Sufficiently Fleshed Out Even to Create a Conflict 13

2. CERTIORARI SHOULD NOT BE GRANTED ON ACCOUNT OF *CITY OF CANTON, OHIO V. HARRIS*, SINCE THE FACTS SUPPORTING MUNICIPAL LIABILITY IN THE PRESENT CASE WOULD ALSO SUPPORT LIABILITY UNDER *CANTON* 15

CONCLUSION 16

APPENDIX A

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases

City of Canton, Ohio v. Harris, 57 U.S.L.W. 4270 (U.S. Feb. 28, 1989) 15, 16

Owen v. the City of Independence, 445 U.S. 622, 644, 649 (1980)..... 10

Payton v. New York, 445 U.S. 573 (1980) 10, 14

Steagald v. United States, 451 U.S. 204 (1981) ..... *passim*

United States v. De Parias, 805 F.2d 1448 (11th Cir. 1986) 13, 14

United States v. Leon, 468 U.S. 897 (1984) 13

Constitutional Provisions

U.S. CONST., amend. IV 10, 11

Statutes

42 U.S.C. § 1983 ..... i, 16

CONCISE STATEMENT OF THE CASE

1. *A Note on the Pleadings.* Defendants are incorrect in suggesting [Petition for Cert., 2] that plaintiff "generally alleged" a policy of inadequate training and negligence. Plaintiff's allegations regarding the City of Santa Barbara's policies and customs addressed in detail the refusal to provide guidelines, policies or supervision, and the overtly wrong-headed officer training which were proved at the trial [Amend. Comp., ¶¶ 3(b)(ii), (iii), (iv), (v) and (ix); see Petition for Cert., App. A, 6a-8a].

2. *Irma Perez' Residence and Family (Plaintiff's Evidence).* On March 8, 1983, plaintiff Irma Jean Perez lived with her three children: her sons Benny (then 13) and Michael (10) and her daughter Denica (4), in a three-bedroom apartment at 13 South Soledad Street, Apt. 3, Santa Barbara, California. They had lived there for several years. Her bedridden father, Eloy Perez, who resided in Texas, had been staying with her for several months. Irma Perez had a bedroom to herself. Her daughter had a bedroom. The two boys alternated, one sharing a bedroom with their grandfather and the other sleeping downstairs on the living room sofa [2 RT 62:15-65:7].

Irma Perez' immediate family includes three brothers and two sisters, all adults and residing in Santa Barbara. Her older brother, Albert Perez, had for many years gone a different way from the rest of the family. He had done time in prison, and had numerous contacts with the law, including an ongoing relation with his probation officer and with the Santa Barbara Police Department. In March of 1983, Albert lived across town from Irma Perez, at 1404 Bath Street, with their mother and two sisters. Albert had not lived in the same household with Irma Perez since she established her own home, years before these events. He had never lived with her at 13 South Soledad Street, and did not live there on March 8, 1983. Albert babysat for Irma from time to time, but only when she asked him; these were the only times he was permitted to spend the night in her apartment. This was a City Housing Authority apartment; under applicable rules, it was leased to Irma Perez for occupancy only by her and her three children. She would lose it if anyone else resided there [*Perez,* 2 RT 103:23-105:4, 108:1-21].

3. *The Narcotics Section is Reminded of Albert Perez (Defendants' Testimony).* On March 8, 1983, the Narcotics Section of the Santa Barbara Police Department comprised defendants Nalls (sergeant in charge), Simmons and Miller. They all knew Albert Perez. The department had received two arrest warrants for Albert during the past year, one of which they had served, and one (issued five months before, for failing to make a court appearance) they had not. They had been to his address at 1404 Bath Street several times, but he was not there.

On the morning of March 8, 1983, Albert Perez' name was mentioned at an informal police briefing; the officers were aware of him, but not specifically looking. They would keep an eye out for him. Their routine that day included cruising areas of Santa Barbara where they might encounter persons addicted to controlled substances, since these people emerge daily to go "from point to point" for necessary purchases. They cruised in the vicinity of Soledad Street, though not looking for Albert Perez; nor had they sought him there in connection with the previous arrest warrant [*Nalls,* 3 RT 72:16-73:16, 75:14-84:19].

4. *Albert Sighted and Lost/ An Inquiry Regarding His Sister's Address (Defendants' Testimony).* Shortly after noon, defendants Nalls, Simmons and Miller (plainclothes, unmarked vehicle) were driving on a cross street through Soledad Street. As they eased through the intersection, they saw Albert Perez walking toward them on Soledad Street (in the same block as the apartment complex where Irma Perez lived). Albert was about 100 feet away. Sgt. Nalls observed, "There's Albert." Defendant Simmons (driving) slowed, continued through the intersection, and let defendant Miller out. Nobody else got out. There was just no place to park. Simmons waited for an opportunity to make a U-turn, did so, and located a parking place. The officers then made a walk-through search of the apartment complex where Irma Perez lived. Seeing no trace of Albert, they talked things over. Defendant Miller remembered that on a prior occasion he and another detective had met Albert and talked to him in this area. Defendant Nalls remembered that once, in 1980, he had been present when somebody else

arrested Albert on Soledad Street, in front of this very apartment complex [*Nalls*, 3 RT 85:12-93:10].

Sgt. Nalls also remembered that when Albert was arrested in 1980, he had a relative who lived in this apartment complex, but Nalls could not remember which apartment. Defendants Miller and Simmons were unable to help as to the address, but Sgt. Nalls remembered the name — Irma Perez. They decided that since they had not found Albert, he must have gone to Irma Perez' apartment. Sgt. Nalls decided to have one of the officers at the police station look up Irma Perez' address. He used the radio in his vehicle to ask the dispatcher where she lived. But when the answer was delayed, all three officers got back in their vehicle and drove several blocks away to a pay telephone. They left no one to watch the apartment complex while they were gone, nor did they request that any other officer be sent there to watch it. They were gone 10 or 11 minutes. They learned that Irma Perez' residence was Apt. 3. Sgt. Nalls had no intention of getting a search warrant. The need for one "just didn't occur to me" [*Nalls*, 3 RT 92:20-94:25, 96:5-16, 97:22-99:3, 102:4-22].

On the way back to the apartment complex, Sgt.Nalls radioed for the assistance of a uniformed officer. They were all in plainclothes; a uniformed officer would "validate who we were as police officers not just someone off the street demanding or asking to go into someone's home" [*Nalls*, 3 RT 105:1-8, 112:3-10].

Defendant Miller testified that, while waiting for the black-and-white to arrive, he walked back into the apartment complex and encountered an acquaintance, one Billy Roberts. Defendant Miller testified (limited purpose, state of mind) that Mr. Roberts told him that Albert Perez lived in apartment #3 (Irma Perez' apartment), and that he (Mr. Roberts) had not seen Albert Perez recently [*Miller*, 4 RT 98:6-100:10].

5. *A Different Recollection.* Mr. Roberts testified that on March 8, 1983, he resided with his mother at 21 South Soledad Street, and had been living there eight or nine years. He knew Irma Perez well. He played backgammon with her and sometimes watched her children while she was at work. He also knew that once in a while Albert Perez came to see his sister.

To his knowledge, Albert Perez did not live there. He said he met Albert Perez that day while walking on Soledad Street, about a block north of Irma Perez' apartment complex. He spoke to Albert and kept going. Two officers (whom he identified as defendants Simmons and Nalls) stopped him and asked him if he knew Albert Perez. He told them he did. They asked if Albert Perez lived in apartment #3 and he told them no, adding that he had just seen Albert Perez going down the street a few minutes before [*Roberts,* 2 RT 173:3-178:6].

6. *Arrangements for a Spontaneous Search.* It was not necessary for Sgt. Nalls to give defendants Simmons and Miller any kind of detailed plan for the search of Irma Perez' apartment because they had been doing arrest warrant searches for years, and everybody knew his job [*Miller,* 4 RT 80:20-25]. Nalls would go around to the rear door, in case Albert tried to escape by that route. When defendant Meske arrived in the black-and-white, Nalls told Meske to go to the front door with Miller and Simmons. They were to get Irma Perez' consent if possible, and if she refused admission, enter by force. Once inside, Meske (the only one in uniform) was to "control" anyone in the apartment [*Nalls,* 3 RT 115:7-117:3].

7. *The Fact Situation Immediately Prior to Entry.* Sgt. Nalls did not know of anyone who actually saw Albert Perez enter the apartment complex while being chased; he had not talked to anybody who claimed to have seen Albert go into Irma Perez' apartment, or claimed to have seen him inside, e.g., through a window. Before initiating the forcible entry into Irma Perez' apartment, he had not made any check with the City Housing Authority to find out whether any other name was on the apartment besides hers [*Nalls,* 4 RT 13:7-21]. The same was true of defendant Miller [*Miller,* 4 RT 94:10-23]. There was no claim or evidence that defendants Simmons or Meske had made any such inquiry. Defendant Meske (the last to arrive) assumed ("inferred") that somebody must have seen Albert Perez go into the apartment, but no one told him that [*Meske,* 5 RT 41:3-9].

8. *Santa Barbara Training Policies and Customs\ the State of Training of the Defendant Officers at the Time of Entry.* Defendant the City of Santa Barbara admitted that prior to

March 8, 1983, and throughout the whole period during which it employed the defendant officers, the Police Department had no written policy regarding the circumstances under which police officers could conduct forcible searches of private residences without search warrants, based only on the fact that they were looking for a person for whom an arrest warrant had been issued [Response of defendant the City of Santa Barbara to plaintiff's written interrogatory #7(B); plaintiff's Ex. 7; Excerpts, pp. 73-74; please see APPENDIX A hereof, p. A-1]:

> "The City and its police department had no written policy since the law of search and seizure is changing constantly. The law of search and seizure is taught by the police department on a periodic basis, as a part of the police department's monthly training plan."

Similarly, during the officer employment period, the City conceded that neither it nor anyone acting on its behalf provided Santa Barbara police officers with any written guidelines concerning the warrantless entry or search of a private residence over the objections of the householder, or concerning constitutional provisions or other rules applicable to warrants, or to exigent circumstances justifying warrantless searches [Response of defendant the City of Santa Barbara to plaintiff's written interrogatory #8; plaintiff's Ex. 7; Excerpts, pp. 77-78; please see APPENDIX A hereof, p. A-2].

Finally, during that period, the City had no written policy requiring police officers to file complaints against other officers for conducting unlawful searches of private homes, or using unlawful force or violence on persons being questioned, detained or arrested [Response of defendant the City of Santa Barbara to plaintiff's written interrogatory #7(D); plaintiff's Ex. 8; Excerpts, pp. 75-76; please see APPENDIX A hereof, p. A-3].

As of March 8, 1983, defendant Nalls had been supervisor of the Santa Barbara Police Department Narcotics Detail for about three years. During this time he was involved in personally executing about 200 to 300 search warrants. During that same period, he estimated that he was involved in perhaps

200 additional searches of premises, based on arrest warrants, some of which involved third-party homes. Defendant Nalls said that prior to his search of Irma Perez' apartment without a search warrant on March 8, 1983, looking for someone for whom he had an arrest warrant, he had been involved in "maybe 200" similar searches. He testified that he was not required to submit any reports with respect to third-party warrantless searches, and that his supervisor did not review such searches with him [*Nalls,* 5 RT 151:1-152:13; 6 RT 32:8-33:22].

Defendant Simmons testified that his own involvement in arrest warrant searches during the period leading up to March 8, 1983 was not significantly different from that of defendant Nalls [*Simmons,* 6 RT 35:10-36:6].

Even Officer Meske, a uniformed officer not involved in the Narcotics Detail, had been involved in two or three residential searches made without a search warrant, on the basis that an arrest warrant had been issued for a fugitive whom he thought to be inside. He was not later required to make any special report to any superior regarding these warrantless searches, and to the best of his knowledge the department made no inquiries as to whether circumstances had justified the searches [*Meske,* 5 RT 41:10-42:12].

Defendant Nalls confirmed that on March 8, 1983 the Santa Barbara Police Department had no written procedure, or guidelines, on the subject of legal requirements for warrantless searches of residences.

The Santa Barbara Police Department's monthly training plan included weekly training bulletins on various law enforcement subjects ranging from vehicle stops to search and seizure law, which were distributed to the officers; occasional training videotapes; a departmental subscription to Law Enforcement Legal Reporter, one issue of which apparently referred to *Steagald v. United States*, and briefings by a deputy district attorney who worked closely with the Narcotics Section [*Nalls,* 5 RT 158:1-166:20]. As a result of this training, defendant Nalls believed on March 8, 1983 that if Albert Perez was staying at Irma Perez' apartment, that made her apartment his "home," and they did not need a search warrant [*Nalls,* 3 RT 147:9-152:3, 153:6-154:22;4 RT 10:18-11:10]. He concluded,

based on his training by the department, that "residence" was wherever a person was staying, i.e., a boat, hotel, mobile home or motor home — just where the person happened to be spending the night. He concluded that a person like Albert Perez, who sleeps around, who sleeps with a girlfriend for a couple of nights and then somewhere else for a couple of nights, and has enough friends to repeat this process, no more than two or three nights in any one place, could actually have ten different "residences" in a month, for purposes of an arrest warrant search. He believed, based on his training, that if he were looking for Albert and did not have a search warrant, he could simply go to wherever Albert was staying; and that this procedure was the policy of the Santa Barbara Police Department, expressly based on the *Steagald* case [*Nalls,* 3 RT 155:9-158:20; 4 RT 10:18-11:10]. He concluded that his basic problem was simply to find out where Albert was staying [*Nalls,* 4 RT 12:6-13]. The need for a search warrant "just didn't occur to me" [*Nalls,* 3 RT 102:21-22].

Defendant Simmons, who received the same training, said that it was his understanding of applicable law and departmental policy that officers had a right to enter and search a residence "when they had a reasonable belief that a probation violator was living or staying at the residence," and that given the facts available to the officers in the Perez case, their search of Irma Perez' apartment without a search warrant was within the policy of the Santa Barbara Police Department [Response of defendant Simmons to plaintiff's written interrogatory #6; Excerpts, pp. 79-80; please see APPENDIX A hereof, p. A-2].

9. *A Forcible Entry Without a Search Warrant.* When the police knocked on her door, Irma Perez was at home with her father and daughter; Denica had the chicken pox, and was wearing only a T-shirt; she was downstairs with her mother. Without opening the door, Irma Perez asked who was there.The defendants identified themselves as police, and said they were looking for Albert Perez. She said, "Well, Albert doesn't live here." They said they had a "warrant for his arrest." She asked them to pass the warrant through the mail slot, but they insisted that they had to hand it to her. When she opened the door enough for them to do so, they threw it open by main force,

pushed her aside and proceeded to search her house. [*Perez,* 2 RT 65:8-66:17, *Miller,* 4 RT 82:16-83:1, *Simmons,* 4 RT 124:6-125:8]. Defendant Simmons said that Irma Perez tried to block him from entering, but that, assisted by officer Meske, he shoved her aside [*Simmons,* 4 RT 125:9-126:12]. She was protesting their entry and asking them to leave her house. He told her to "shut up." She insisted that they had no right to be in her house, and should leave [*Perez,* 2 RT 66:18-67:8]. She walked toward the sofa where Denica was resting. Officer Meske, walking behind her, grabbed her and threw her into a wooden rocking chair, hard enough to make it slide against the wall. Meske then pinned her in the chair, putting his hands on top of her wrists to pin them to the arms of the chair, and kneeling on her, with one leg across her thighs, putting his weight on her. She remonstrated. After a short time, he let her up [*Perez,* 2 RT 69:4-75:24].

10. *A Call for Police Assistance Interrupted by an Immediate Arrest.* When defendant Meske released her, Irma Perez walked across the room to a wall telephone located in her kitchen and dialed 911. The dispatcher's tape [plaintiff's Ex. 6, in evidence; Excerpts, p. 71] contains the following:

911: 911

Perez: Yeah, I was wondering ... I'd like to speak to somebody about policemen harassing me ... who to speak to or whether, what can I do about it.

911: You want to complain about the officers?

Perez: Yes, I sure do.

911: Call the non-emergency line, please. That number is 963-3616.

Perez: Thanks.

At about this time, defendants Simmons, Nalls and Miller, having ascertained that Albert Perez was not in the apartment, and having interrogated Eloy Perez as to whether he knew his son was a wanted man, had come downstairs and were in the act of leaving her apartment; Simmons and Meske were almost to the front door. At that point, Simmons was not intending to arrest Irma Perez, although he thought there was

"strong evidence suggesting she had committed a violation" [*Miller*, 4 RT 83:21-86:24; *Simmons*, 4 RT 137:9-22].

Irma Perez, having completed her first call, was about to make the second call when, without warning, one of the officers came up behind her and suddenly cut her off by depressing the receiver. She was angry. She threw the instrument on the floor and demanded to know why he had done that. Without answering, he immediately spun her around, facing the wall, threw her up against the wall, handcuffed her behind her back in a very painful way, and told her she was under arrest "for harboring a fugitive" [*Perez*, 2 RT 79:1-81:4]. The officer was defendant Simmons [*Nalls*, 3 RT 128:7-132:13]. Defendant Simmons testified (deposition) that he arrested Irma Perez to prevent her from making the phone call, because that would be "an additional crime," i.e., "making a false report basically" [*Simmons*, 4 RT 140:17-141:9].

11. *The Long Way to Jail.* They handled her out the door, through gathering neighbors, to the police car. When leaving the apartment, one of the officers told Irma Perez she was an unfit mother and threatened to take her daughter away from her; Denica heard the threat, and later confronted her mother, in tears, with questions about what it meant. When they got to the black-and-white, the defendants "opened the door and threw me inside," so that her right shoulder slammed against the door frame[*Perez*, 2 RT 81:21-88:3, 97:12-99:20].

Instead of taking her directly to the County Jail for booking, they took her first to the Santa Barbara police station, where they left her alone, in handcuffs, for about 20-30 minutes, and then took photographs of her arms. [*Perez*, 2 RT 88:11-91:10] They finally took her to jail, where her booking was completed about 6:15 p.m. [Plaintiff's Exhibit 2, in evidence, Booking Record; Excerpts, p. 66]. After posting bail (premium, $250), Irma Perez was released, and got back to her apartment between 11:00 p.m. and midnight [*Perez*, 2 RT 95:13-96:25].

ARGUMENT

1. CERTIORARI SHOULD NOT BE GRANTED ON THE FOURTH AMENDMENT ISSUE BECAUSE: (1) THE APPLICABLE LAW WAS SETTLED BY *STEAGALD*; (2) THE NINTH CIRCUIT DECIDED THIS CASE CORRECTLY; AND (3) THE ELEVENTH CIRCUIT CASE IS SUFFICIENTLY AMBIGUOUS THAT UNSUPPORTABLE ASSUMPTIONS ARE NECESSARY IN ORDER TO READ IT AS CONFLICTING WITH *STEAGALD*

A. *The Need to Ask the Question Right.* Petitioners define the "Fourth Amendment issue" which they have selected for this Court's review as whether *Payton v. New York*, 445 U.S. 573 (1980), should be "clarif[ied]" as to "what probable cause standard is to be applied with respect to the determination of when a suspect is living in third-party dwelling"; and whether this standard is to be applied to "actual residence" [Petition for Cert., 5-6]. The question posed is inappropriate since it presupposes the determination of the person who should apply the probable cause standards to the question of actual residence versus suppositious residence, and by implication determines this person to be a policeman and not a magistrate. By dressing up their issue in this way, petitioners can argue for a mantle of "good faith" immunity for the officers in this new decision-making field.

The real question here is whether a search warrant was necessary, i.e., who should determine whether this search should have been allowed, the officers or a magistrate? The case that petitioners really want to change is not *Payton*, but *Steagald v. United States*, 451 U.S. 204 (1981), which requires a search warrant on these precise facts.

B. *A Matter of Perspective.* It is refreshing to consider this case just from the standpoint of the City of Santa Barbara, setting aside for the moment petitioners' assertion that the officers are entitled to a "good faith defense" for an elective warrantless search. Municipalities are not entitled to any defense arising from the good faith of their employees; they have no discretion at all to violate the Constitution or federal statutes. *Owen v. the City of Independence*, 445 U.S. 622, 644, 649 (1980). From the City's perspective, the relevant

questions are whether a search warrant was necessary, and if so, whether the warrantless search resulted from a policy or custom of the City.

The Fourth Amendment says:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In *Steagald v. United States*, 451 U.S. 204 (1981), *supra*, the Court used the following language in holding that a third-party home could not be searched without a search warrant by officers who held an arrest warrant only, for a fugitive whom they suspected of staying there overnight [445 U.S. 212-213]:

> [W]hile an arrest warrant and a search warrant both serve to subject the probable cause determination of the police to judicial review, the interests protected by the two warrants differ. ...
>
> Thus, whether the arrest warrant issued in this case adequately safeguarded the interests protected by the Fourth Amendment depends on what the warrant authorized the agents to do. To be sure, the warrant embodied a judicial finding that there was probable cause to believe that Ricky Lyons had committed a felony, and the warrant therefore authorized the officers to seize Lyons. However, the agents sought to do more than use the warrant to arrest Lyons in a public place or in his home; instead, they relied on the warrant as legal authority to enter the home of a third person based on their belief that Ricky Lyons might be a guest there. Regardless of how reasonable this belief might have been, it was never subjected to the detached scrutiny of a judicial officer. Thus, while the warrant in this case may have protected

> Lyons from an unreasonable seizure, it did absolutely nothing to protect petitioner's privacy interest in being free from an unreasonable invasion and search of his home. Instead, petitioner's only protection from an illegal entry and search was the agent's personal determination of probable cause.

The requirement for a residential search warrant derives from two facts: (1) a particular location is somebody's residence; and (2) the government proposes to search that residence. In this case, the only thing the defendants really knew about 13 South Soledad Street, Apt. 3, was that it was Irma Perez' residence. That is how they identified the place they wanted to search — they asked headquarters for the address of Irma Perez, Albert's sister. They certainly proposed to search her residence. A search warrant was prima facie necessary.

It is familiar law that the two exceptions to the search warrant requirement are exigent circumstances and consent. Nobody claims this was a consensual search; and none of the defendants contended at the trial that the officers were in hot pursuit or that the search was justified by exigent circumstances. Defendants requested no instructions on exigent circumstances, presented no evidence on that subject, made no such jury argument, and never raised the issue on appeal. Their abandonment of exigent circumstances was understandable, since the officers had not seen Albert go into Irma Perez' apartment, or even into that apartment complex, had not talked to anyone who had claimed to have seen Albert go there, or to have seen him inside. Moreover, the officers had collectively abandoned the scene to go several blocks away to find a pay phone. They were not in pursuit; they no longer had their quarry in sight. They simply had a hunch that Albert Perez could be found in his sister's apartment, wherever that was, and they believed (from their training) that if he were found there that fact would automatically make her apartment his "residence." Defendant Nalls' erroneous training re *Steagald* [discussed above] misled him so much that it "never entered [his] head" to ask for a search warrant, although courts were open.

A search warrant was required so a magistrate, not a policeman, could decide *in light of the given fact that Irma Perez*

resided at 13 South Soledad, Apt. 3, whether there was probable cause to believe that: (1) Albert Perez actually resided in Irma Perez' apartment, as a *co-resident with her;* as distinguished from being present as a guest; and that (2) he was presently in that apartment.

We are aware of no case which extends the rule of *United States v. Leon*, 468 U.S. 897 (1984), re officer reliance on the validity of a search warrant actually issued by a magistrate, to mean that an officer's "good faith" opinion that a search warrant is not necessary can excuse and validate a warrantless, and otherwise unconstitutional search. Such a case would nullify the Fourth Amendment.

C. *The Court Below Decided This Case Correctly.* The Ninth Circuit opinion was properly applied on *Steagald v. United States*, 451 U.S. 204 (1981). The Ninth Circuit was not required to make new law, and made none. If this Court granted certiorari, we believe it would probably arrive at the same result. The expenditure of judicial time would not be justified unless there were a patent conflict between the Ninth Circuit and some other circuit on this point. The petitioning hand points without wavering at *United States v. De Parias*, 805 F.2d 1448 (11th Cir. 1986). That confidence seems rash.

D. *The De Parias Opinion is Not Sufficiently Fleshed Out Even to Create a Conflict.* Petitioners' Eleventh Circuit issue rests entirely on two paragraphs [805 F.2d at 1457]:

> Ramirez argues that the entry of the FBI agents into his Los Angeles apartment violated his Fourth Amendment rights because the FBI possessed only arrest warrants for Julio and Julita De Parias. An arrest warrant alone is an insufficient basis for searching a third party's home for those named in the warrant. *Steagald v. United States*, 451 U.S. 204, 213, 101 S.Ct. 1642, 1648, 68 L.Ed.2d 38 (1981). Therefore, Ramirez argues, the FBI needed a search warrant to enter the apartment.
>
> Ramirez's argument rests on the assumption that the apartment was also not the

> residence of Julio and Julita De Parias, for 'an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.' *Payton v. New York*, 445 U.S. 573, 603, 100 S.Ct. 1371, 1388, 63 L.Ed.2d 639 (1980). The district court's determination that the FBI agents reasonably believed that Julio and Julita De Parias resided in the apartment and were in there at the time is not clearly erroneous. The apartment manager had informed the FBI agents that the De Pariases lived there and that they were home if a certain car was parked in front of the apartment. That car was present when the FBI agents arrived. Therefore, the arrest warrant alone authorized their entry.

For all that appears in the opinion, the Eleventh Circuit may have adopted findings by the court below that: (1) the apartment was not Ramirez' residence, but was the residence of Julio and/or Julita De Parias; and (2) the FBI agents were not on inquiry, and had no information indicating that the apartment was Ramirez' apartment or that he might be found there. In that case, *Steagald v. United States*, 451 U.S. 204 (1981), would not apply, and entry for purposes of arresting Julio and/or Julita De Parias would have been proper under *Payton v. New York*, 445 U.S. 573 (1980).

Consequently, the holding in *United States v. De Parias*, 805 F.2d 1448 (11th Cir. 1986), is far from clear,and in insufficient to give rise to a conflict with the Ninth Circuit finding in the present case, or with *Steagald v. United States*, 451 U.S. 204 (1981).

2. CERTIORARI SHOULD NOT BE GRANTED ON ACCOUNT OF *CITY OF CANTON, OHIO V. HARRIS*, SINCE THE FACTS SUPPORTING MUNICIPAL LIABILITY IN THE PRESENT CASE WOULD ALSO SUPPORT LIABILITY UNDER *CANTON*

Sgt. Nalls was in charge of this narcotics detail for three years before this incident, during which time he was personallyinvolved in some 400 to 500 searches. He had, without restriction to that three-year period, been involved in about 200 residential searches similar to the one in this case, i.e., purisuant to arrest warrants [*Nalls*, 5 RT 151:19-152:13]. He and the other officers were very much in need of instruction regarding warrantless searches of third-party homes based solely on an arrest warrant. The City of Santa Barbara declined to promulgate any policy on that subject, either written or unwritten. It had no policy of supervising searches of third-party homes, or reviewing records of those searches, thus foreclosing any possibility of learning the extent of such searches or even which officers might be in need of retraining.

More importantly under *City of Canton, Ohio v. Harris*, 57 U.S.L.W. 4270 (U.S. Feb. 28, 1989), the City embarked on an affirmative training program involving written materials which the officers could discuss among themselves, and occasional sessions with district attorneys, as a result of which (according to Sgt. Nalls) he felt certain that wherever a person like Albert Perez spent the night, that place could be searched without a search warrant. He believed that Albert resided wherever he slept, on a boat or anywhere, and that in view of his sleeping around with girlfriends, he could have as many as ten "residences" in a month. The warrantless search of plaintiff's apartment was concededly a direct result of this training program. That is a clear case of municipal liability, whether the standard is called gross negligence or deliberate indifference.

CONCLUSION

Certiorari should be denied. If it is granted for the purpose of elucidating *City of Canton, Ohio v. Harris,* 57 U.S.L.W. 4270 (U.S. Feb. 28, 1989), regarding municipal liability under 42 U.S.C. § 1983, this case should be scheduled for full briefing.

DATED: March 24, 1989

Respectfully submitted,

/s/ JOHN M. SINK
JOHN M. SINK

APPENDIX A

Plaintiff's Exhibits Nos. 7, 8, 9 and 10, in evidence [Excerpts, pp. 73-80, 87-88], posed the following questions and elicited the following responses:

"INTERROGATORY NO. 7: With reference to the time period beginning on the date of the earliest job application mentioned in your answer to the preceding interrogatory [the job applications of defendants Simmons, Nalls, Miller and Meske] and ending on March 8, 1983 [hereinafter referred to as the OFFICER EMPLOYMENT PERIOD], state fully the policy of the Santa Barbara Police Department, including full descriptions of any documents which then embodied or from time to time have embodied said police policies, with respect to the following subjects:

"....

"b. Under what circumstances Santa Barbara police officers are permitted to search private residences by forcible entry and without a warrant, on the ground that the officers are looking for a person for whom an arrest warrant has been issued, where the person sought does not reside at the premises to be searched, and where the officers have not verified the presence of such person on such premises at the time of the search."

[Response to Interrogatory 7b]: "The City and its police department had no written policy since the law of search and seizure is changing constantly. The law of search and seizure is taught by the police department on a periodic basis, as part of the police department's monthly training plan." [Excerpts, pp. 73-74]

"d. Whether Santa Barbara police officers should be indoctrinated to file administrative or criminal complaints against other officers for conducting unlawful, forcible searches of private homes, or for using unlawful force or violence on persons being questioned, detained or arrested; and whether officers should forcibly intervene to prevent such conduct."

[Response to Interrogatory 7d]: "The City is informed and believes and on that basis answers that it is unaware of any such written policy." [Excerpts, pp. 75-76]

"INTERROGATORY NO. 8: "During the OFFICER EMPLOYMENT PERIOD ... state whether you or anyone acting on your behalf has provided Santa Barbara police officers with written guidelines concerning the warrantless entry or search of a private residence over the objections or the homeowner or other occupant, constitutional provisions or other rules concerning warrants, or exigent circumstances justifying warrantless searches; and if so, describe such guidelines and state their content in full ...."

[Response to Interrogatory No. 8] "No." [Excerpts, pp. 77-78]

"INTERROGATORY NO. 6 [to defendant Wayne A. Simmons]: State your understanding, as of March 8, 1983 (your state of mind on that date) of what the policy of the Santa Barbara Police Department was on that date, with respect to the circumstances under which Santa Barbara police officers were permitted to search private residences without a search warrant, over the objections of the householder or occupant, on the ground that the officers were looking for a person for whom an arrest warrant had been issued, with special reference to whether the officers were required to verify that that person sought to be arrested then resided at the premises to be searched, and whether the officers were required to verify that the person sought to be arrested was actually present on such premises at the time of the search."

[Response to Interrogatory No. 6] "It was my opinion on March 8, 1983, that given the facts available to us in the Perez case, our actions were within the policy of the Santa Barbara Police Department. It was my understanding of the applicable law and departmental policy, that police officers had the right to enter and search a residence, when they had a reasonable belief that a probation violator was living or staying at the residence." [Excerpts, pp. 79-80]

"INTERROGATORY NO. 7 [to defendant Wayne A. Simmons]: With reference to your answer to the preceding interrogatory, state:

"a. Whether your answer is based in whole or in part on some written guideline or written policy of the Santa Barbara Police Department; if so, state fully and in detail the provisions of such written guideline or written policy …."

[Response to Interrogatory 7a] "It is my belief that a written policy or written guideline regarding specific information in the preceding interrogatory does not exist."

"b. State the name, address and telephone number of each person who has an original or copy of such written guideline or policy."

[Response to Interrogatory 7b] "None."

"c. Whether your answer is based in whole or in part on any unwritten guideline or policy of the Santa Barbara Police Department; if so, state fully and in detail the provisions of such unwritten guideline or policy."

[Response to Interrogatory 7c] "It is my belief that an unwritten guideline or policy of the Santa Barbara Police Department regarding specific information in the preceding interrogatory dos not exist."

"d. State the name, address and telephone number of each person who has or claims to have knowledge of such unwritten guideline or policy."

[Response to Interrogatory 7d] "None."

[Excerpts, pp. 87-88]

CERTIFICATE OF SERVICE

JOHN M. SINK hereby states:

1. I am a member of the Bar of this Court (No. 71479).

2. A copy of this Opposition to Petition for Writ of Certiorari was, to my knowledge, served on the opposing parties by mailing three copies thereof in sealed envelopes with first class postage fully prepaid in the United States Mail in Santa Barbara, California, addressed as follows:

Steven A. Amerikaner, City Attorney
David K. Hughes, Assistant City Attorney
P. O. Drawer P-P
Santa Barbara, CA 93102

Kristofer Kallman, Esq.
800 Presidio
Santa Barbara, CA 93101

3. The Petition for Writ on Certiorari was received by my office on February 15, 1989. Since the 30-day period for serving a response therefore (to and including March 17, 1989) was extended one week, to and including March 24, 1989, this service by mail was timely under Rule 22.1.

DATED: March 24, 1989.

JOHN M. SINK

STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA BARBARA)

On this 24th day of March, 1989, before me, a Notary Public in and for the State of California, personally appeared JOHN M. SINK, personally known to me to be the person whose name is subscribed to this instrument, and acknowledged that he executed it.

WITNESS my hand and official seal.

OFFICIAL SEAL
DOROTHY S. CLAPP
NOTARY PUBLIC - CALIFORNIA
SANTA BARBARA COUNTY
My Comm. Expires June 12, 1989